NO. 2179

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN B. GOODWIN.....Plaintiff in Error,

-- versus --

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

Filed----------

Clerk of the United States
Circuit Court of Appeals.

THOMAS E. FLANNIGAN,
Attorney for Plaintiff
in Error.

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STATEMENT OF THE CASE

During the morning of the fifteenth day of September, 1910 one Alfred Hillpot and Fred Kibbey were found dead in a house in the White Mountain Indian Reservation in Gila County, Arizona.

The Plaintiff in Error, John B. Goodwin, and one William Stewart, were indicted in the District Court of the Fifth Judicial District of the County of Gila, on the

Territorial side of the court, for having murdered them.

A severance was demanded at the trial and each was given a separate trial for the killing of Fred Kibbey; each was found guilty of murder in the first degree and the jury in the case fixed the punishment at life imprisonment in the Territorial prison.

After they had been confined in the Territorial prison for over a year they were again indicted on the United States side of the court, in the same district, on two separate indictments, for the murder of Fred Kibbey and Alfred Hillpot.

At the trial a severance was again had and each was tried in the United States court for the murder of Alfred Hillpot.

On the trial of the case the Plaintiff in Error was found guilty of murder in the first degree for the killing of Alfred

Hillpot and the jury fixed the punishment at death. The co-defendant, William Stewart, was also convicted of murder in the first degree and the jury fixed the punishment at life imprisonment.

From the verdict of the jury and the judgment of the court the Plaintiff in Error took an appeal to the Supreme Court of the Territory of Arizona, from which court the case was transferred to this court for hearing.

ASSIGNMENT OF ERRORS

I.

The court erred in permitting the United States Attorney to ask of the jurors, over the objection of the defendant, the following questions:

> "If you were sworn as a juror in a murder case and it appeared to you beyond a reasonable doubt; that you were convinced beyond a reasonable doubt that the defendant was guilty of a murder, and it was particularly atrocious

> and brutal kind, have you any views on the subject of capital punishment, or of the death penalty, that would preclude you from bringing in a verdict of this kind ?" (Tr. pg. 21 and similar questions on pages 52, 54, 55, 59, 68, 71, 73, 75 and 83).

II.

The District Attorney, in his closing argument to the jury, made use of the following language:

> "Do not let it be said, gentlemen, that you as jurors did not have the nerve to attach the death penalty; because, gentlemen of the jury, this case, if ever there was a case, is one in which it is merited."

To all of which declarations, expressions and arguments of the District Attorney the defendant at the time objected; but his objections were by the court overruled and the defendant at the time excepted. (Tr. pg. 301). This we assign as error.

III.

The court erred in permitting the witness Charles Dean to testify over the ob-

jection of defendant to a conversation had with the co-defendant Stewart regarding the homicide. (Tr. pgs. 262 and 267).

The court erred in permitting the witness Henry Thompson to testify over the objection of the defendant to a conversation had with the Plaintiff in Error regarding the homicide. (Tr. pgs. 279 and 281).

The court erred in refusing to grant the Plaintiff in Error a change of venue, as is shown by the motion and affidavit on file in this case.

The court erred in admitting incompetent evidence over the objection of the defendant.

ARGUMENT

The District Attorney in his examination of the jury repeatedly asked them, over defendant's objection,

"That in a case where it appeared that the murder was particularly brutal

> and atrocious in its nature if they would hesitate to inflict the death penalty."

This was error, and the court should have sustained defendant's objections to the questions as improper. The question properly put is:

> "Have you such conscientious opinions against the infliction of the death penalty that would preclude you in finding the defendant guilty where the punishment might be death ?" (R. S. of Ariz. page 1340).

The District Attorney asked the proper questions of some of the jurors: (Tr.pgs. 25, 28, 34, 36, 38, 39, 40 and 41). But the ruling on the question as to a murder of a particularly brutal and atrocious kind was only for the purpose of getting before the jury at the outset that the trial of Plaintiff in Error was for murder characterized as "brutal and atrocious".

When defendant objected to the question as improper, the court gave as its reason for overruling the objection, as follows:

> "I think the prosecuting attorney is entitled to ask the juror with reference to his state of mind for the purpose of gaining information upon which to base peremptory challenge. It is not a ground of challenge for cause; but for the purpose of stating-----of ascertaining the state of mind of the juror for the purpose of exercising a peremptory challenge I think the question is within the proper limits." (Tr. pg. 70).

We do not think that the reason assigned relieved the minds of the jury from being impressed by the question of the District Attorney that the case they were being examined on as to their qualifications was a case of the character designated by the District Attorney. In other words, the court permitted the District Attorney to lay a foundation in the very start, by his examination of the jury, for what he afterwards took advantage of in his closing argument. He was permitted by the court to ask if in a case of an extremely brutal and atrocious kind they would hesitate to inflict the death penalty. To a

certain extent he procured from them a pledge that they would pronounce the death sentence if the case was as he said, and would not hesitate in doing so. Now after laying the foundation, as it were, for his final argument, by placing before the minds of the jury the proposition that under the case as presented by him they would have no hesitancy in hanging the defendant, he then placed the matter up to them in the following words:

> "Do not let it be said, gentlemen, that you as jurors did not have the nerve to attach the death penalty; because, gentlemen of the jury, this case, if ever there was a case, is one in which it is merited."

The defendant at the time objected to the remarks as improper, but the court overruled the objection. Yet the court did sustain the objections of the defendant to remarks made by the District Attorney in his closing argument that were not half as deadly and prejudicial to the de-

fendant as were the arguments of counsel which the court refused to sustain defendant's exception to. (Tr. pg. 301).,

When the words were still ringing in the ears of the jury "Do not let it be said, gentlemen, that you did not have the nerve.." the court then and there refused to sustain defendant's objection to the District Attorney's remarks. What further conclusion could or did the jury come to unless it was the belief that the court acquiesced and sanctioned the remarks of the District Attorney and believed with him that they should hang the defendant ? Even admitting, for the sake of argument, that the District Attorney had a right to examine the jury in the manner he did and ask the questions regarding what they would do if certain things were proven to them, we still hold that his closing arguments made the questions error, for he placed the

jury in a position----by practically saying it would be cowardice on their part not to hang the defendant, he placed the jury in a position compelling them to say that they would do certain things and then put the matter squarely before them purely as a matter of "nerve" on their part.

We contend that the District Attorney's statements in closing were a breach of professional and official duty which, upon the defendant's protest, should have been rebuked by the court and the jury instructed to disregard it. The presiding judge, by declining to interpose, notwithstanding the defendant's protest against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it; and the court by so doing committed a grave error manifestingly tending to prejudice the defendant with the jury, and which, there-

fore, was a proper subject for exception; and having been duly excepted to, should entitle defendant to a new trial.

All courts agree that it is the duty of the presiding judge, either of his own motion or upon the request of the opposing party or his counsel, to interpose and check the party or his counsel in any improper and prejudicial line of argument.

The only question regarding the argument of the District Attorney in this case for this court to decide is: Was the argument of the District Attorney improper, and was it prejudicial to the defendant ?

In closing we desire to particularly call the attention of the court to the transcript of the record for the general facts in this case, which in our judgment renders the verdict of the jury and the judgment of the court, imposing the death penalty, unmerited.

The law does not contemplate or provide for such a result from such a state of facts.

Respectfully submitted,

Thomas E. Flannigan

Attorney for Plaintiff in Error.

United States Circuit Court of Appeals
For the Ninth Circuit

John B. Goodwin,
Appellant.

vs

The United States of America,
Appellee.

BRIEF OF APPELLEE

ARGUMENT OF APPELLEE

At the outset, I am confronted with the title of the cause as it appears in the appellant's brief wherein John B. Goodwin is names as *Plaintiff in Error* and the United States of America as *Defendant is Error.* As I understand the situation, this is not a proceeding *in error* at all. I hesitate to base a motion to dismiss, on the ground that no petition in error has been filed, or citation served, for the reason that it is possible that the counsel for John B. Goodwin has inadvertently, in the title of the cause, referred to the parties as plaintiff and defendant in error. However, I take the liberty of directing the attention of the Court to the title of the cause, and now submit, without argument, the question of whether or not the proceeding in this Court should be dismissed. In any event, as my understanding is that this pro-

ceeding is an appeal, I shall hereafter refer to the parties as "John B. Goodwin, Appellant," and "The United States of America, Appellee."

An examination of the statement of the case as it appears in the brief of the appellant, discloses that appellant asserts that he, togther with one William Stewart, in the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Gila, the said court being a territorial court. was tried, convicted and sentenced for the murder of one Fred Kibbe, and that appellant was confined under such sentence in the Territorial Prison for about a year prior to the time when the indictment in this case was returned. It is not clear to me why the appellant inserts this allegation in his statement of the case, as he does not assign as error the indictment, trial, or conviction in this particular case. He therefore, of course does not contend that there was anything improper or irregular in the fact that he was indicted and convicted in the case now before this Court. The indictment in the Territorial Court charged him with the killing of one Fred Kibbe, while in the District Court of the Fifth Judicial District of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States, he was charged with the murder of another person, to-wit, Alfred Hillpot. It is apparent, therefore that no plea of jeopardy, or former conviction, could avail the appellant. As is well known to this court, under the judicial system in vogue in the Territory of Arizona before its admission as a state. there were no United States courts, but the Territorial Courts acted with superimposed powers, as indicated in the title of the court last above mentioned in which this case was tried. In any event, the Territorial Court had no jurisdiction to try the defendant for the murder of Kibbe. for the reason that said murder occurred upon the White Mountain Indian Reservation, and the killing was done by the appellant, John B.

Goodwin, who is not an Indian. The facts in this case are practically identical with those in the case of Ex Parte Wilson, 140 U. S. 575, 35 Law Ed 513, in which the exclusive jurisdiction of the Territorial Courts, acting as United States Courts, over crimes committed by persons other than Indians within the limits of Indian reservations in territories was fully sustained. Ex Parte Wilson was a case arising in the same county in which the murder in the case at bar was committed. Wilson was indicted, tried, convicted, and sentenced to suffer death in the District Court of the Second Judicial District of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States, Gila County at that time being in the Second Judicial District of the Territory of Arizona. The murder was shown to have been committed within the limits of the White Mountain Indian Reservation, the same as in this case. Wilson prosecuted a writ of habeas corpus to the Supreme Court of the United States, and Mr. Justice Brewer, in a remarkably able opinon, discussed the law pertaining to the matter of jurisdiction, that being the ground upon which the petitioner sought to sustain his application, and that learned Justice concludes his opinion with this remark:

> "It follows that, as the Circuit Courts of the United States have jurisdiction over the crime of murder committed within any fort, arsenal, or other place within the exclusive jurisdiction of the United States, so, prior to 1885, the District Courts of a territory had jurisdiction over the crime of murder committed by any person other than an Indian upon an Indian reservation within its territorial limits and that such jurisdiction has not been taken away by the legislation of that year."

There has been no legislation on this subject since that referred to in the opinion of Mr. Justice Brewer just quoted. Other authorities to the same effect are:

United States vs. Bridleman, 7 Fed. Rep. 894;
United States vs. Ewing, et al., 47 Fed. Rep. 809;

In re Gon-Shay-ee, Petitioner, 130 U. S. 343, 32 Law Ed. 973;

A reading of these authorities shows that the law is absolutely settled that the Territorial courts, acting as United States courts, had, while Arizona was a territory, the sole and exclusive jurisdiction of the crime of murder committed within the limits of Indian reservations in said territory by persons other than Indians.

The appellant directs his entire argument to a discussion of the matters set forth in Assignment of Errors I and II, and I therefore presume that he does not deem the other assignments of error of sufficient importance to take up the time of the Court, by presenting any remarks to sustain them.

As the appellant has argued Assignment of Errors I and II, jointly, I shall follow his example and discuss them in the same manner.

Bitter complaint is made because the United States Attorney, in examining jurors on their voir dire, asked the question substantially, as to whether or not the juror, if the evidence in a murder case convinced him beyond a reasonable doubt that the defendant was guilty of murder and that the murder was of a particularly atrocious and brutal kind had any views on the subject of capital punishment, or the infliction of the death penalty, which would preclude the juror from returning a verdict of guilty and affixing thereto the death penalty. As the learned judge who tried the case pointed out, (Page 70 Trans. of Evid.), the United States Attorney was acting clearly within the legitimate scope of examination of this nature, seeking to discover the condition of mind of the juror, so that he might have proper basis upon which to intelligently exercise his peremptory challenges. I do not believe that it is necessary to cite

authorities to sustain a self-evident proposition. It is quite apparent that the appellant has failed to discover any authorities to sustain his view, otherwise he would have cited the same in his brief. No attempt whatever was made, by the United States Attorney, to base a challenge for *cause,* upon any response elicited by any such question. The record will show that, whenever the United States Attorney challenged any juror for cause, upon the ground of conscientious scruples against capital punishment, the question, which drew forth the objectionable answer, was carefully framed under and was in compliance with the statute then controlling such a condition, (Sub-division 14, Section 910, Penal Code, Revised Statutes of Arizona, 1901).

That the murder for which the appellant was on trial was of a particularly brutal and atrocious kind, must be conceded by anyone familiar with the facts in this case. The transcript of evidence shows, not only beyond a reasonable doubt, but absolutely beyond any question whatsoever, that the appellant, together with one William Stewart, for some time prior to the date of the murder, had been living on a small ranch, in the wilds of the White Mountain Indian Reservation, some fifty miles from Globe, Arizona. That shortly before the killing, Alfred Hillpot and Fred Kibbe, two young men from Globe, Arizona, went on a hunting trip and were invited by appellant and Stewart to stop at the ranch, accept of their hospitality, and make the ranch their headquarters on their hunting expedition. The testimony is such that it will necessarily convince anyone reading it that, just after dark, on the day after Kibbe and Hillpot had so accepted the apparently friendly invitation of appellant and Stewart, and immediately after all four had eaten supper in the house where appellant and Stewart were living, Fred Kibbe, while resting after dinner, smoking his pipe, with his elbows carelessly placed behind him on a table, he being seated in a chair without a back, was, without notice or warning whatsoever, shot down, in absolute cold

blood, the weapon used being an extra size forty-five six shooter, the bullet entering the right corner of the left eye, penetrating the inter-cranial cavities and making its exit, approximately on a level with the entrance wound, about the center of the back of the head. At practically the same moment, Alfred Hillpot, who had been reclining on the floor, with his head upon a saddle, also resting after dinner and smoking his pipe, was shot twice with a 30-40 Winchester rifle, once through the left shoulder, the other wound being from the left side of the body, about six inches above the hip, to the right shoulder, the ball passing behind the heart, and neither wounds being instantaneously fatal; that after Hillpot had been so desperately wounded, and while lying upon the floor absolutely helpless from the effects of the gunshot wounds, he was beaten over the head with the stock of the 30-40 Winchester rifle with such violence and brutal strength and determination that his brains were dashed out and spattered over the walls above his head to a height of six to seven feet; and so terrific was the impact of these blows and the persistency with which they were delivered, in the cruel blood lust of his assailant, that the stock of the rifle was split in twain and knocked free from the rifle itself, and there lay in pieces upon the floor, entirely apart from the rifle when the bodies of these unfortunate young men were discovered. And not content with this most awful and shocking murder, for surely the unfortunate Hillpot was absolutely dead after his brains had been dashed out, his assailant deliberately stabbed the corpse with a large hunting knife, sinking it into the throat of the body behind the breast bone and about an inch to the left of the median line, down into the aorta and there twisted the knife round and round again, until the hole in the neck of the body, caused by the most awful atrocity, was several inches in diameter.

It is not my purpose to discuss, in any way, the evidence in this case, and the above statement, ghastly, gruesome and almost incredible in its ferocity, is only made to show this Court that the words "particularly brutal and

atrocious", which appear in the question to which such vigourous objection is made, were fully justified by the facts which later appeared in evidence. This being a capital case in which the appellant is under sentence of death, I have no doubt whatever that the judges of this honorable Court will carefully read the testimony as it appears in the Transcript of Evidence, and I am content to rest, so far asthe above statement is concerned, upon the opinion which they will draw therefrom.

The appellant, in his second assignment of error, protests that it was grossly improper and a violation of the professional and official duty of the United States Attorney, which should have been rebuked by the Court and the jury admonished to disregard it, for the prosecutor to have used the language quoted in said assignment, that is to say:

> "Do not let it be said, gentlemen, that you as jurors, did not have the nerve to attach the death penalty; because, gentlemen of the jury, this case, if ever there was a case, is one in which it is merited."

I do not for a moment imagine that this Court will hold that it was error of the slightest kind for the United States Attorney to have used this language in his argument. After diligent search through many of the cases relating to improper conduct and remarks of District Attorneys, I have been unable to find one single court which has held such language as error, or even criticized the prosecutor for its use. Again, the appellant has been unable to find any authority whatsoever to sustain his position.

The first two paragraphs in Assignment of Error III are entirely too vague to justify any consideration by this Court, but the record will show that the conversations therein referred to were had in the immediate presence of the appellant, in his hearing, and with his attention fully directed to the entire conversation. That such evidence is

admissible has been held so often that I would deem it an idle waste of the valuable time of this Court to cite any authorities, although there are a forest of them.

The third paragraph in Assignment of Error III relates to the refusal of the Court to grant a change of venue. This is a matter almost entirely within the discretion of the Trial Court, and an examination of the motion and affidavits attached thereto and filed in connection therewith, will convince this Court that the learned judge who presided at the trial of this case in no way abused his discretion, but, on the contrary, was absolutely right in denying the motion.

The fourth paragraph in Assignment of Error III is so general and vague in its terms that surely the Court will not consider it.

The appellant was fairly convicted of one of the most ghastly, cold blooded and atrocious murders that ever stained the fair name of Arizona; a jury of his own selection found him guilty beyond all reasonable doubt, upon evidence which overwhelmingly proved that he was the perpetrator of this awful crime; he was represented by able counsel, none more gifted or experienced in the state; his every right was safeguarded; the jury unanimously said, upon their oaths, that he merited and should suffer the death penalty.

The judgment of the lower court should be affirmed.

Respectfully submitted,

J. E. MORRISON,
United States Attorney for the District of Arizona.